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EEOC Examines Use of Leave as Reasonable Accommodation

By Marcie B. Cornfield, Esq.

On June 8, 2011, the EEOC held a Commission Meeting where the use of leave as a reasonable accommodation was explored. During the meeting, the EEOC reiterated the importance of providing leave in certain circumstances as a reasonable accommodation. The EEOC noted that while many requests for leave can be handled under an employer's regular leave policies, some situations require making exceptions to an employer's leave policies. For instance, the EEOC specifically provided its stance on "no fault" leave policies - i.e., those policies under which an employee is automatically terminated after using a certain amount of leave - stating that such policies "*must* be modified as a reasonable accommodation, absent undue hardship, if an employee with a disability needs additional leave." (Emphasis added)

The Commission Meeting follows a recent trend of increased EEOC challenges to employer leave policies. This trend is perhaps best demonstrated by review of recent press releases from the EEOC, which have highlighted the EEOC's role in recent litigation:

- [Phone Company Pays \\$20 Million to Settle Nationwide EEOC Disability Suit](#). The EEOC charged that the company violated the ADA by refusing to make exceptions to its "no fault" attendance plans to accommodate employees with disabilities. According to the EEOC, under the challenged attendance plans, if an employee accumulated a designated number of "chargeable absences," the company placed the employee on a disciplinary step which could ultimately result in more serious disciplinary consequences, including

termination. The EEOC asserted that the employer failed to provide reasonable accommodations for people with disabilities, such as making an exception to its attendance plans for individuals whose "chargeable absences" were caused by their disabilities. Instead, the EEOC said, the company disciplined or terminated employees who needed such accommodations.

- Restaurant Pays \$1.3 Million to Settle EEOC Disability Discrimination Lawsuit. The EEOC alleged that the employer maintained a maximum medical leave policy that automatically denied workers any additional medical leave beyond a pre-determined limit, even when additional leave was required by the ADA as a reasonable accommodation, resulting in the unlawful termination of a class of workers.
- Teleconferencing Company Pays \$40,000 to Settle EEOC Disability Discrimination Law Suit. The EEOC charged that the teleconferencing company violated the ADA when it refused to accommodate the disabilities of a longtime employee, who had been seriously injured in an automobile accident on her way to work in February 2009, by refusing to extend her leave of absence for one month. Instead, the EEOC alleged that the company terminated her right after she had received clearance from her doctor to return to work in one month.
- Retailer Pays \$6.2 Million for Disability Bias. In this case, the company had a policy where employees could receive one year of leave. The Chicago Area EEOC office described this case as one where "A service technician work[ed] for many years for a giant retailer with a maximum one-year leave policy. If you are on leave for more than a year, you are out the door." The EEOC alleged the employer failed to satisfy its ADA obligations by placing the service tech on leave and then failing to seriously consider him for a reasonable accommodation that would put him back on the job - including reassignment to another position, even though the employee received one year of leave.
- National Grocer Pays \$3.2 Million to Settle Disability Discrimination Suit. The company also maintained a one-year disability leave period. The EEOC alleged that the employer terminated employees at the end of the year rather than returning them to work with a reasonable accommodation, or considering whether there was a reasonable accommodation that could allow them to return to work prior to the expiration of the leave period. The case was resolved by the court's entry of a \$3.2 million consent decree.

Unfortunately for employers, neither the EEOC nor federal courts has provided clear-cut guidance as to how much leave an employer must provide to an employee. However, based on the aforementioned litigation, employers may want to consider the following principles when making that determination:

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- Engage in the interactive process. The amount of leave provided to employees is meant to be an individualized, fact-intensive approach. Make sure that you are discussing with the employee how much leave he or she may need. Do not just turn down the employee's leave request because the requested leave time exceeds your company's policy.
- Don't assume a generous leave policy will suffice. As seen from the press releases, generous leave policies do not necessarily equate to insulation from litigation.
- Consider whether the leave will create an undue hardship. While leave does not need to be provided if it causes an undue hardship, certain factors will never make the request for leave an undue hardship. For instance, the fact that other employees are angry over the amount of leave provided and the anger negatively impacts morale will never suffice to prove undue hardship. Moreover, when discussing the undue hardship analysis in leave situations, the EEOC has stated that "rarely is cost asserted as an undue hardship to providing leave as an accommodation." Rather, "[i]n certain circumstances, undue hardship will derive from the disruption to the operations of the entity that occurs because the employer can neither plan for the employee's return nor permanently fill the position." Undue hardship related to leave may depend on such factors as the employer's ability to have the employee's duties performed in his or her absence and the consequences to the employer's business if the duties cannot be performed by others.
- Ensure there are exceptions for fixed-leave policies. The EEOC guidance is clear that an employer may not simply follow its own fixed-leave policy and terminate a disabled employee who needs leave beyond the set period without considering whether additional leave could be provided without undue hardship.
- Don't provide too much leave. Follow-up. Ensure your company has written policies in place for following up with employees on medical leave. Do not leave employees out on leave indefinitely for years on end with no communication. When that employee then contacts you regarding return to work, your business may not be able to establish undue hardship in returning the employee.
- Communicate with third-party administrators. Some employers utilize third parties to assist them with leave management. Ensure third-party administrators are appropriately communicating with the employee and conveying the communications to you.

Above all else, documentation is key. Not only should your company document efforts to engage in the interactive process, but don't "leave well enough alone." When an employee does not return from leave, make sure efforts to communicate with the employee are documented. Failure to do so may result in the type of press you don't want.

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